

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 4, 2008 Session

MELISSA GRAVES BURTON v. DAVID LEIGH BURTON

**Direct Appeal from the Chancery Court for Sevier County
No. 04-7-359 Hon. Telford E. Forgety, Jr., Chancellor**

No. E2007-02904-COA-R3-CV - FILED FEBRUARY 9, 2009

In this divorce action, following an evidentiary hearing, the Trial Judge awarded primary residential custody of the parties' two minor children to the father. The mother has appealed and we affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Franz F. Springmann, Sr., Sevierville, Tennessee, for appellant, Melissa Graves Burton.

Rebecca C. McCoy, Sevierville, Tennessee, for appellee, David Leigh Burton.

OPINION

This appeal arises from a final judgment regarding a permanent parenting plan and the designation of defendant as the primary residential parent.

The parties were married on August 28, 1991. At the time of the marriage the mother was twenty and the father was forty-four. At the time the final judgement of divorce in April 2006, the mother was thirty-four and the father was fifty-nine. The father has a degree in accounting and worked for the Federal Law Enforcement Training Center in Brunswick, Georgia for thirty years, until his retirement in January 2005. The father had been married and divorced twice before his marriage to the mother and had four children from the first and second marriages. The mother has

a bachelors degree in nursing and at the time of the divorce she had worked at the Fort Sanders Sevier Medical Center since 2001. Twin sons were born of this marriage on August 15, 1998. The parties approved an Agreed Order of Divorce, leaving for trial the issue of primary residential parent status, child support and the mother's alimony claim regarding payment of her attorney's fees.

Following an evidentiary hearing, the Trial Court filed a Memorandum Opinion, wherein the Trial Court noted that the evidence was highly disputed and the credibility of the witnesses was critical. The Court did quote specifically "... credit the father's testimony on those facts."

The Trial Court found the mother had entered into a love affair with a married man who worked on the Burton's new home during the time the father was still living in Georgia, and that the paramour moved into the Burton's new home, went on camping trips and vacations with the mother and the boys and attended local events and school functions for the boys. The mother acknowledged that their behavior in front of the boys was inappropriate and the Trial Court found this behavior, including the paramour sleeping at the mother's home with the children present, had not ceased and continued even during the time of the hearing.

The Court said that after considering all relevant and statutory case law factors, that he concluded custody should be placed with the father, and then enumerated examples of the mother interfering with the father's relationship and contact with the boys, as follows:

- a. The mother stated at the October hearing that it was not in the best interest of the children for the father to be more involve with them.
- b. Father had been picking the boys up from school and keeping them until The mother got off work. The mother stopped this situation without a good reason just before the hearing.
- c. The mother instituted a policy with the school that she was to be called if Father came to the school, again without a good reason.
- d. The mother changed the locks on the gate to exclude Father from the marital home but gave a key to the gate to her boyfriend.
- e. The mother allowed her boyfriend to move into the marital home with her and the boys and took the boys on vacation and camping trips with her boyfriend.
- f. The mother put the children in day care and after school care while she worked even though Father was fully available and willing to care for them for free without a good reason.

The mother has appealed and presents the issue of whether the Trial Court erred when it designated the father the primary residential parent?

We review a trial court's findings of fact in a divorce case *de novo* with the presumption that the trial court's factual determinations are correct unless the evidence preponderates against such factual determinations. *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn.1999). The trial court's legal conclusions are reviewed *de novo* with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge, who has the opportunity to observe the witnesses in their manner and demeanor while testifying, is in a far better position than this Court to decide those issues. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995).

Trial courts have broad discretion in devising permanent parenting plans and designating the primary residential parent. In reaching such decisions the courts should consider the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999).

The parenting plan which designated the father as the primary residential parent was put in place by the Trial Court pursuant to Tenn. Code Ann. § 36-6-401 *et seq.* Tenn. Code Ann. § 36-6-404(b) provides the factors the court shall consider when providing a residential schedule as part of a permanent parenting plan.

The first factor set forth in Tenn. Code Ann. § 36-6-106(a) requires a consideration of the love, affection and emotional ties existing between the parents and child. The children are fortunate as they have two parents who seem to love them very much and want to provide a safe and stable home for them. The mother testified the father loves the children and the children love the father. The father testified that he loves the children and that he has a good relationship with them. Based upon the evidence, this factor favors both parents.

The second factor looks to the disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which the parent has been the primary care giver. The mother was the primary care giver to the boys during the time she and the boys were in Tennessee before the father retired. However, both parents agreed that they shared parenting responsibilities equally during the first three years of the children's lives. The fact that the mother was with the boys more during the last couple of year before the divorce does not necessarily weigh in favor of the mother. The father criticized several decisions the mother made regarding Aaron's health care and stated the mother had not continued taking the children to wellness checkups after moving to Tennessee. The father also found fault with the mother's decision to have the children attend an after school program instead of allowing him to take the boys to his house to do home work after school. He also said the mother did not cloth Aaron appropriately. On the other hand, the mother did not feel the father was involved enough in the planning for Aaron's special education needs and she found fault with the lack of furniture for the boys in the father's home. The record on the whole does not support a finding that either parent was not capable of

providing for the boys in an equal way.

The third factor requires consideration of continuity in the child's life and the length of time the child has lived in a stable environment. The mother's testimony attempted to show that the father had played little or no role in the boys' lives once they moved to Tennessee. However, the father's testimony on this issue was different in that he showed that he spent much more time with the boys and was much more involved with their lives than the mother had testified. Here, the Trial Court's finding that the father was credible and the mother was not, impacts on the decision. We give great deference to the Trial Court's determination on credibility.

The fourth factor requires an assessment of the stability of the family unit of the parents. The father and his mother appear to have a close and stable relationship and the boys saw their paternal grandmother often. The mother attempted to show the father was not particularly close with his older children. However, it does not follow that the father's distant relationship with two of his older children has any bearing on his relationship with the twins.

Factor five, the mental and physical health of the parents, is not an issue. There was no testimony to indicate that either parent had a physical or mental impairment that would interfere with their parenting activities.

Factor six requires an inquiry into the home, school and community record of the child. This factor does not appear to be an issue.

Factor seven is not applicable due to the children's age.

Factor eight is not applicable either as there was no evidence that either boy was a victim of physical or emotional abuse.

Factor nine requires examination of the character and behavior of any other person who resides in or frequents the parents' homes and interacts with the child. The father was living alone at the time of the hearing but he had lived with his mother for several months after he returned to Tennessee and the boys had stayed with him at their grandmother's house. No evidence was presented at the hearing that showed the grandmother was not of good character or that her behavior was an issue.

The mother had lived with her paramour for seven months in 2005 and at the time of the trial he was often at the mother's house. The boys had also spent time on vacations and on camping trips with the paramour. While a court may not punish an adulterous parent for an extramarital affair by designating the other parent as the primary residential custodian, a court may consider the effect of a parent's extramarital affair on the children and on the parent's fitness as a custodian under the best interest analysis provided by Tenn. Code Ann. §36-6-106(a). *Lockmiller v. Lockmiller*, No. E2002-02584-COA-R3-CV, 2003 WL 23094418 at * 5 (Tenn. Ct. App. Dec. 30, 2003). By his own admission, the paramour was not a good influence on the boys as he testified that, although he did not believe it was appropriate and in the best interest of the boys for he and the

mother to cohabit without the benefit of marriage, he did so anyway. The mother conceded her choice to live with the paramour was not appropriate. Moreover, the Trial Court, who had the opportunity to observe the paramour during his lengthy examination at the hearing, found the paramour to be untruthful, an unfavorable character trait that could be harmful to the children. We conclude this factor weighs in favor of the father.

Factor ten requires an inquiry into each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. The Trial Court found that this factor weighed heavily in favor of the father. Both parents had demonstrated that they were good and responsible parents in the past and there was no evidence presented that the parents would change in this respect. However, the Trial Court found the mother had demonstrated in a least six specific ways that she had not and would not in the future facilitate and encourage a close and continuing parent-child relationship between the boys and the father. The Trial Court was concerned by the mother's statement that she believed that it was in the boys' best interest that the father not be more involved in their lives. The Trial Court found that this factor weighed in favor of the father against the mother.

A careful review of the entire record on appeal demonstrates that the Trial Court properly considered all of the relevant factors when he determined that the father was best suited to be the primary residential parent. Both the mother and the father are fit parents, however it is the Court's responsibility to designate the responsibility of each parent for children's best interest.

The preponderance of the evidence does not weigh against the findings of fact by the Trial Court and the Trial Court did not err when it designated the father as the primary residential parent. We affirm the Judgment of the Trial Court and remand with the cost of the appeal assessed to Melissa Graves Burton.

HERSCHEL PICKENS FRANKS, P.J.